

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CATHY D. MILLER)	
Claimant)	
)	
VS.)	
)	
MOONS HOMETOWN MARKET)	
Respondent)	Docket No. 1,026,423
)	
AND)	
)	
HAWKEYE SECURITY INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the April 24, 2007 preliminary hearing Order entered by Administrative Law Judge(ALJ) Robert H. Foerschler.

ISSUES

Following a preliminary hearing the ALJ authored a document entitled "Preliminary Decision". This document, dated April 24, 2007, purports to decide the issues presented to the ALJ, namely claimant's request for medical treatment for what she alleges is a work related claim.¹

On May 1, 2007, respondent filed an Application for Review raising certain jurisdictional issues, specifically including whether claimant sustained a personal injury by accident and whether her injuries arose out of and in the course of her employment along with timely notice.

¹ On May 3, 2007, the ALJ wrote to the parties and apparently attempted to address some questions or concerns expressed by the parties with respect to his Preliminary Decision. However, respondent had already appealed the ALJ's formal opinion and that letter will not be considered by the Board.

Claimant alleges there is no jurisdiction for the present appeal and that the Preliminary Decision should merely be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant alleges a compensable injury occurred on October 15, 2006. Respondent has vigorously defended this claim and a number of preliminary hearings have been held. Then, on April 12, 2007, yet another preliminary hearing was held. The issue at this hearing was claimant's request for an evaluation and/or treatment to her knee as a result of her alleged accident. At the ALJ's direction, claimant had already undergone an independent medical examination at the hands of Dr. Lowry Jones and that report suggested claimant was in need of an arthroscopic evaluation and possibly physical therapy.

Following that hearing, the ALJ issued an order that purports to decide the issue presented. However, upon careful examination, this Board Member concludes that the ALJ's Preliminary Decision does not, in reality, contain any decision. There are musings about the qualifications of the independent medical examiner and the routine nature of the proposed procedure. Nonetheless, none of this verbage can reasonably be construed as a decision. Even the parties have a difference of opinion as to what this document achieves. Claimant maintains this is an order for yet another independent medical examination and respondent seems to believe there are legal findings with respect to the compensability of claimant's alleged claim, based upon *Johnson*.²

Because the Preliminary Decision contains no decision which this Board Member can review, this member therefore finds that there is no justiciable controversy and the appeal is therefore dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.³ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

² *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

³ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Robert H. Foerschler dated April 24, 2007, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of June 2007.

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Jason J. Montgomery, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge